

1 UNITED STATES DISTRICT COURT
 2 FOR THE WESTERN DISTRICT OF NORTH CAROLINA
 3 (Asheville Division)

4 -----x
 5 UNITED STATES OF AMERICA, :
 6 Plaintiff, :
 7 :
 8 :
 9 vs :Criminal Action:1:17-CR-73
 10 :
 11 DAVID R. PAYNE, :
 12 :
 13 Defendant. :
 14 -----x

11 February 15, 2018
 12 Charlotte, North Carolina

13 The above-entitled action came on for a Rule
 14 11/Plea Hearing Proceeding before the HONORABLE DAVID S.
 15 CAYER, United States Magistrate Judge, commencing at
 16 10:00 a.m.

17 **APPEARANCES:**

18 On behalf of the Plaintiff:

19 **DANIEL V. BRADLEY, Esquire**
 20 Office of the U.S. Attorney - WDNC
 21 233 U.S. Courthouse Building
 22 100 Otis Street
 23 Asheville, North Carolina 28801

21 On behalf of the Defendant:

22 **PETER C. ANDERSON, Esquire**
 23 Beveridge & Diamond, PC
 24 409 East Boulevard
 25 Charlotte, North Carolina 28203

24 Tracy Rae Dunlap, RMR, CRR 828.771.7217
 25 Official Court Reporter

I N D E X

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P R O C E E D I N G S .

THE COURT: United States versus David Payne.

MR. ANDERSON: Yes, Your Honor. Pete Anderson for Mr. Payne. Good morning.

MR. BRADLEY: Good morning, Your Honor. Daniel Bradley on behalf of the United States.

THE COURT: Good morning. Are you ready to proceed, Mr. Anderson?

MR. ANDERSON: Yes, I am Your, Honor.

THE COURT: Mr. Payne, stand up there. Sir, I will be asking you some questions about your plea; the clerk will place you under oath first.

THE CLERK: Place your left hand on the Bible, and raise your right.

(Witness duly sworn at 10:01 a.m.)

EXAMINATION

BY THE COURT:

Q. Sir, do you understand that you're now under oath and that you're required to give truthful answers to the questions I'm about to ask?

A. I do.

Q. Do you understand that if you give false information under oath you may be prosecuted for perjury or false statement?

A. Yes.

1 Q. After consulting with your attorney, do you want
2 the Court to accept your guilty plea to one count in this
3 Bill of Indictment?

4 A. Yes.

5 Q. You understand that you have the right to have a
6 United States district judge conduct this proceeding?

7 A. Yes, sir.

8 Q. Recognizing your right to proceed before a
9 district judge, do you expressly consent to proceed in
10 this court today? That is before a United States
11 magistrate judge?

12 A. I do.

13 Q. Are you now under the influence of any alcohol or
14 drugs?

15 A. I am not.

16 Q. Is your mind clear, and do you understand that
17 you're here to enter a guilty plea in your case?

18 A. Yes.

19 Q. Have you received a copy of the indictment, and
20 have you discussed its contents with your attorney?

21 A. Yes.

22 THE COURT: Mr. Bradley, would you summarize the
23 charge and the penalty?

24 MR. BRADLEY: Yes, Your Honor. The defendant is
25 entering a guilty plea in Count Eight of the Bill of

1 Indictment which alleges false statements to a bank in
2 connection with a loan application. Specifically, that
3 count alleges that on or about August 27th 2009, in
4 Buncombe County, in the Western District of North
5 Carolina and elsewhere, the defendant, David R. Payne,
6 knowingly made false statements for the purpose of
7 influencing an institution, the accounts of which were
8 then insured by the FDIC, that is Bank of Asheville min
9 connection with an application for a loan. The false
10 statements in question are provided in the factual basis
11 to which the parties have agreed. The maximum penalties
12 for violation of 18, United States Code, Section 1014,
13 are a maximum fine of \$1 million, a maximum term of
14 imprisonment of 30 years, or both, and a maximum term of
15 supervised release of five years.

16 Thank you, Your Honor.

17 **FURTHER EXAMINATION**

18 BY THE COURT:

19 Q. Do you fully understand the charge against you,
20 including the maximum penalty you face if convicted?

21 A. I do.

22 Q. Do you understand that by pleading "guilty" to a
23 felony charge you may be deprived of certain civil rights
24 such as the right to vote, hold public office, serve on a
25 jury, or possess a firearm?

1 A. I do.

2 Q. Have you spoken with your attorney about how the
3 U. S. Sentencing Guidelines might apply to your case?

4 A. I have.

5 Q. Do you understand that the district judge will not
6 be able to determine the applicable sentencing guideline
7 range until after your presentence report has been
8 prepared and you've had an opportunity to comment on it?

9 A. Correct. Yes, I understand.

10 Q. Do you understand that in some circumstances you
11 may receive a sentence that's different that is either
12 higher or lower than that called for by the guidelines?

13 A. I understand.

14 Q. Do you understand that the Court may order
15 restitution, where applicable?

16 A. Yes.

17 Q. Do you understand that if the sentence is more
18 severe than you expected, or the Court does not accept
19 the government's sentencing recommendation, you will
20 still be bound by your plea and you'll have no right to
21 withdraw it?

22 A. I understand.

23 Q. Do you understand that parole has been abolished,
24 and if you're sentenced to a term of imprisonment you
25 will not be released on parole?

1 A. Yes.

2 Q. If your sentence includes imprisonment you
3 understand that the district judge may also order a term
4 of supervised release?

5 A. Yes.

6 Q. Do you understand that if you violate the terms
7 and conditions of supervised release, which typically
8 last from one to five years, you could be returned to
9 prison for an additional period of time?

10 A. Yes.

11 Q. Do you understand that you have a right to plead
12 "not guilty," to have a speedy trial before a judge and
13 jury, to summons witnesses to testify in your behalf, and
14 to confront the witnesses against you?

15 A. I understand I have that right.

16 Q. If you exercised your right to trial you would be
17 entitled to the assistance of a lawyer, you would not be
18 required to testify, you would be presumed innocent, and
19 the burden would be on the government to prove your guilt
20 beyond a reasonable doubt. Do you understand all of
21 these rights?

22 A. Yes.

23 Q. By entering this plea of "guilty" you're waiving,
24 or giving up, those rights and there will be no trial.
25 If your guilty plea's accepted there will be one more

1 hearing where the district judge will determine what
2 sentence to impose. Do you understand that?

3 A. I do.

4 Q. Are you in fact guilty of the one count in this
5 Bill of Indictment?

6 A. I am.

7 THE COURT: Have the United States and the
8 defendant entered into a plea agreement?

9 MR. BRADLEY: Yes, Your Honor.

10 THE COURT: You may summarize that.

11 MR. BRADLEY: Thank you, Your Honor. The
12 essential terms of the plea agreement are as follows.
13 The defendant agrees to enter a voluntary plea of guilty
14 to Count Eight as set forth in the Bill of Indictment and
15 admits to being in fact guilty of the offense charged in
16 Count Eight. In exchange for that plea, and if the Court
17 finds the defendant's plea to be voluntarily and
18 knowingly made and accepts the plea, then the United
19 States will be moving at the appropriate time to dismiss
20 counts one through seven in the Bill of Indictment.

21 With respect to the sentencing guidelines, and
22 pursuant to Rule 11(c)(1)(B), the Federal Rules of
23 Criminal Procedure, the parties have agreed to the
24 following.

25 a. The United States will argue that the amount

1 of actual loss attributable to the defendant's conduct
2 for purposes of the guidelines, Section 2B1.1(b)(1) is
3 more than \$250,000 but not more than \$550,000.

4 b. The defendant reserves the right to argue that
5 the amount of actual loss attributable to the defendant's
6 conduct for purposes of guidelines Section 2B1.1(b)(1) is
7 any number higher than \$40,000.

8 c. The defendant understands that loss under
9 guidelines Section 2B1.1 may be different from, greater
10 than, or lesser than restitution under 18, United States
11 Code, Section 3556.

12 d. The parties agree that the guidelines Section
13 2B1.1(b)(16)(A) and/or 2B1.1(b)(16)(D) enhancements for
14 gross receipts in excess of \$1 million do not apply.

15 e. The United States agrees that the defendant's
16 entry of plea is timely for purposes of guidelines
17 3E1.1(b).

18 f. Notwithstanding any other recommendation
19 herein, if the Court determines from the defendant's
20 criminal history that guidelines Section 4B1.1 or 4B1.4
21 applies, such provision may be used in determining the
22 sentence.

23 g. The parties agree that the defendant may argue
24 his position regarding any other offense characteristics
25 and reductions to the offense level. The United States

1 will not seek any up upward departures, enhancements, or
2 variances.

3 h. The United States further agrees it will
4 recommend a sentence at the low end of the sentencing
5 range established by the United States Sentencing
6 Guidelines, as determined by the Court at sentencing, so
7 long as that sentencing range is within Zone D of the
8 guidelines sentencing table. If the sentencing range
9 determined by the Court at the sentencing hearing falls
10 within any zone other than Zone D of the guidelines
11 sentencing table then the United States will recommend a
12 sentence that is within that guideline sentencing range.

13 i. The defendant may seek a departure or variance
14 from the applicable guideline range determined by the
15 district court at sentencing. However, if the defendant
16 wishes to argue for a departure or variance that could
17 take the sentence outside of the advisory range, the
18 defendant will notify the Court, the probation officer,
19 and the United States at least ten days in advance of
20 sentencing of the facts or issues the defendant intends
21 to raise. If the defendant intends to rely upon any
22 expert report or opinion at sentencing, the defendant
23 must disclose any such opinion or report to the United
24 States 30 days in advance of the sentencing date.

25 j. The United States agrees it will inform the

1 Court and probation office of all facts pertinent to the
2 sentencing process and will present any evidence
3 requested by the Court. The defendant will also provide
4 supplemental information to the probation officer.

5 With respect to the procedure. The defendant has
6 agreed that a duly qualified federal magistrate judge may
7 conduct the hearing required by Rule 11.

8 With respect to waivers. The defendant is aware
9 the law provides certain limited rights to withdraw a
10 plea of guilty, has discussed these rights with defense
11 counsel, and knowingly and expressly waives any right to
12 withdraw the plea once the magistrate judge has accepted
13 it.

14 Furthermore, the defendant, in exchange for the
15 concessions made by the United States in this plea
16 agreement, waives all rights to contest the conviction
17 and/or sentence except for claims of ineffective
18 assistance of counsel or prosecutorial misconduct.

19 Finally, this agreement is effective and binding
20 once signed by the defendant, defendant's attorney, and
21 an attorney for the United States. There are no
22 agreements, representations, or understandings between
23 the parties in this case other than those explicitly set
24 forth in this plea agreement or as noticed by the Court
25 during the plea colloquy and contained in writing in a

1 separate document signed by all parties.

2 Thank you, Your Honor.

3 **FURTHER EXAMINATION**

4 BY THE COURT:

5 Q. Do you understand those to be the terms of your
6 plea agreement, and do you agree with those terms?

7 A. I do and I do.

8 MR. ANDERSON: Your Honor, if I can clarify.
9 There is on Page 4 the entry of a money judgment which
10 the parties have just signed today. I don't know whether
11 you want us to present that or just for your signature
12 and file it subsequently, but we have entered a \$167,000
13 money judgment which is memorialized in a separate
14 agreement.

15 MR. BRADLEY: That's right, Your Honor, and I
16 anticipated presenting this to Your Honor at the close of
17 the Rule 11.

18 THE COURT: That's fine.

19 **FURTHER EXAMINATION**

20 BY THE COURT:

21 Q. Has the right to appeal your conviction and
22 sentence been expressly waived in this plea agreement?

23 A. Yes. Yes.

24 Q. Has the right to challenge your conviction and
25 sentence in a post-conviction proceeding also been waived

1 in the plea agreement?

2 A. Yes.

3 Q. Is that your signature on the plea agreement?

4 A. Let me look at it. It is.

5 Q. Are you aware that a Factual Basis has been filed
6 as an attachment to your plea agreement?

7 A. Yes.

8 Q. Have you read this factual basis, and do you
9 understand it and agree with it?

10 A. I do. I did and I do.

11 Q. Has anyone threatened, intimidated, or forced you
12 to enter a guilty plea today?

13 A. No.

14 Q. Other than the terms of your plea agreement has
15 anyone made you any promises of leniency or a light
16 sentence to induce you to plead guilty?

17 A. No.

18 Q. Have you had enough time to discuss with your
19 attorney any possible defenses you may have to this
20 charge?

21 A. Yes.

22 Q. Are you satisfied with the services of your
23 attorney in this case?

24 A. I am.

25 Q. Is there anything that you would like to say at

1 this time about the services of your attorney?

2 A. No.

3 Q. Have you heard and understood all parts of this
4 proceeding, and do you still wish to plead guilty?

5 A. I have and I do.

6 Q. Do you have any questions or statements that you
7 would like to make at this time?

8 A. No, Your Honor.

9 THE COURT: Mr. Anderson, have you reviewed each
10 of the terms of the plea agreement with him, and are you
11 satisfied that he understands those terms?

12 MR. ANDERSON: I have, Your Honor, and I am
13 satisfied.

14 THE COURT: I'll submit the transcript for review
15 and signature by counsel and the defendant.

16 The Court finds the plea to be knowingly and
17 voluntarily made and finds the factual basis to support
18 the plea. The plea is accepted. The Court recommends
19 the district judge accept the plea and enter judgment
20 thereon. The defendant has 14 days to make objection.

21 Did you want him interviewed for the presentence
22 report?

23 MR. ANDERSON: Not today, Your Honor. We don't
24 know -- we do want him interviewed. He is from
25 Asheville, but we'll coordinate and interview, and I'd

1 like to be present.

2 THE COURT: That's fine. This just indicates that
3 you do want him to be interviewed at some point.

4 MR. ANDERSON: Yes. Thank you, Your Honor.

5 THE COURT: I'm assuming his conditions of release
6 were previously set.

7 MR. ANDERSON: Yes, they were, Your Honor.

8 THE COURT: Does the government want to be heard
9 on that?

10 MR. BRADLEY: No, Your Honor.

11 THE COURT: He's continued on the same conditions
12 of release.

13 MR. ANDERSON: Thank you, Your Honor.

14 THE COURT: Yes, sir.

15 THE COURT: Yes, sir.

16 (Off the record at 10:15 a.m.)

17 **CERTIFICATE**

18 I, Tracy Rae Dunlap, RMR, CRR, an Official Court
19 Reporter for the United States District Court for the
20 Western District of North Carolina, do hereby certify
21 that I transcribed, by machine shorthand, the proceedings
22 had in the case of UNITED STATES OF AMERICA versus DAVID
23 R. PAYNE, Criminal Action Number 1:17-CR-73, on February
24 15, 2018.

25 In witness whereof, I have hereto subscribed my
name, this 7th day of December, 2018.

24 __/S/__Tracy Rae Dunlap__
25 TRACY RAE DUNLAP, RMR, CRR
OFFICIAL COURT REPORTER